Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1–22–1829 OF 1999
VINCENT NG J
27 MARCH 2002

Civil Procedure *— Affidavits — Capacity of deponent — Matters within knowledge of deponent from records of company — Whether hearsay and inadmissible — Rules of the High Court 1980 O 41 r 5(2)*

Civil Procedure *— Striking out — Statement of claim — Allegations of being shadow director and conspiracy — Whether striking out application appropriate*

The plaintiff sued its former director ('the first defendant') for breach of fiduciary duty and the sixth defendant for, inter alia, conspiracy and breach of trust as a constructive trustee for causing the plaintiff's subsidiary company, Omega Securities Sdn Bhd ('Omega Securities') to run foul of s 67 of the Companies Act 1965 resulting in its stockbroking license to be revoked. The first and sixth defendants applied to strike out the plaintiff's claim and to cease to be the defendants in the suit. The senior assistant registrar dismissed their applications. The defendants appealed. To strike out the plaintiff's claim, the first defendant raised the grounds that: (a) the first defendant was never a shareholder of the plaintiff; (b) the first defendant was never a director of the plaintiff or Omega Securities; and (c) the plaintiff's documents exhibited in its affidavit in reply were inadmissible hearsay. Further, the sixth defendant raised the grounds that: (i) the sixth defendant merely conducted the share transactions in its capacity as a stockbroker in the ordinary course of business; and (ii) the plaintiff's documents exhibited in its affidavit in reply were inadmissible hearsay.

Held, dismissing the appeals:

(1) It was inappropriate to summarily strike out the plaintiff's claim because the very question of whether the first defendant was a shadow director was a question to be tried. A striking out application was not applicable to determine whether a person was a shadow director. That process could only be determined through discovery process or cross examination of the witness (see pp 25F, I–26A); *Re A Company (No 005009 of 1987), ex p Copp & Anor* [1989] BCLC 13 followed. Further, as there were serious allegations of conspiracy against the first defendant, the summary process of terminating the plaintiff's claim upon affidavit evidence was inappropriate without the advantage of oral evidence, cross examination, discovery and interrogatories. Clearly, the plaintiff's claim was not obviously unsustainable (see p 26E).

(2) On ground (c) of the first defendant's appeal and ground (ii) of the sixth defendant's appeal, the complaint was that since the deponent of the plaintiff's first affidavit, Peter Chen was never a director when the cause of action occurred or arose, he had no personal knowledge of its contents; nor was he the maker of those documents exhibited in his affidavit. It was expressly provided under O 41 r 5(2) of the Rules of the High Court 1980 ('the RHC') that affidavits sworn for the purpose of an interlocutory application may contain statements of information or belief with the sources and grounds thereof. Here, Peter Chen had already deposed in the plaintiff's first affidavit that the facts and matters which were deposed in his affidavit were within his knowledge and belief and/or from the records which he, an ex officio, had access to; and he clearly indicated that the source of the information was the records of the plaintiff. Thus, encl 35 did not run foul of O 41 r 5(2) of the RHC and it was legally admissible and competent document for the current purposes (see p 26F–H).

(3) On ground (i) of the sixth defendant's appeal, the plaintiff's action against the sixth defendant was also premised upon conspiracy, whereby it was alleged that the sixth defendant together with the other defendants unlawfully conspired with the predominant purpose of causing loss to the plaintiff and Omega Securities by unlawful means (see p 27H–I). Therefore, the court did not find this to be a fit and proper case for striking out of any of the averments in the amended statement of claim or dismissal of claim against the first and sixth defendants and dismissed both the appeals with costs (see p 28A).

[Bahasa Malaysia summary

Plaintif telah menyaman bekas pengarahnya ('defendan pertama') kerana telah melanggar kewajipan fidusiari dan defendan keenam kerana, antara lain, konspirasi dan pecah amanah sebagai seorang pemegang amanah konstruktif di mana telah menyebabkan anak syarikat plaintif, Omega Securities Sdn Bhd ('Omega Securities') melanggari s 67 Akta Syarikat 1965 sehingga mengakibatkan pembatalan lesen broker sahamnya. Defendan-defendan pertama dan keenam telah memohon untuk membatalkan tuntutan plaintif dan dilepaskan daripada menjadi defendan-defendan dalam guaman tersebut. Penolong kanan pendaftar telah menolak permohonan-permohonan mereka. Defendan-defendan telah membuat rayuan. Bagi membatalkan tuntutan plaintif, defendan pertama telah menimbulkan alasan-alasan bahawa: (a) defendan pertama tidak pernah menjadi pemegang saham plaintif; (b) defendan pertama tidak pernah menjadi pengarah plaintif atau Omega Securities; dan (c) dokumen-dokumen plaintif yang telah diekshibitkan dalam afidavit balasannya adalah dengar cakap tidak boleh diterima. Juga, defendan keenam telah mengemukakan alasan-alasan bahawa: (i) defendan

keenam hanya menjalankan transaksi saham tersebut dalam kapasitinya sebagai broker saham mengikut perjalanan perniagaannya yang biasa; dan (ii) dokumen-dokumen plaintif yang diekshibitkan dalam affidavit jawapannya adalah dengar cakap tidak boleh diterima. A

Diputuskan, menolak rayuan-rayuan tersebut: B

(1) Adalah tidak sesuai untuk membatalkan terus tuntutan plaintif kerana persoalan sama ada defendan pertama adalah pengarah bayangan adalah satu persoalan yang perlu dibicarakan. Satu permohonan pembatalan tidak boleh diterapkan untuk menentukan sama ada seseorang itu adalah seorang pengarah bayangan. Proses tersebut hanya boleh ditentukan melalui proses penemuan atau pemeriksaan balas saksi (lihat ms 25F, I–26A); *Re A Company (No 005009 of 1987); ex p Copp & Anor* [1989] BCLC 13 diikut. Tambahan pula, memandangkan terdapat pengataan-pengataan yang serius tentang konspirasi terhadap defendan pertama, proses terus untuk menamatkan tuntutan plaintif berdasarkan keterangan afidavit adalah tidak wajar tanpa kelebihan keterangan lisan, pemeriksaan balas, penemuan dan soal siasat. Adalah jelas, tuntutan plaintif sememangnya tidak boleh kekal (lihat ms 26E). C D

(2) Berdasarkan alasan (c) kepada rayuan defendan pertama dan alasan (ii) kepada rayuan defendan keenam, aduan bahawa memandangkan deponen kepada afidavit plaintif pertama, Peter Chen tidak pernah menjadi pengarah apabila kausa tindakan tersebut menjadi terakru atau timbul, maka beliau tidak mempunyai pengetahuan peribadi tentang kandungannya; maupun beliau merupakan pembuat dokumen-dokumen yang diekshibitkan dalam afidavit beliau. Adalah dinyatakan di bawah A 41 k 5(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bahawa afidavit-afidavit yang diangkat sumpah bagi tujuan satu permohonan interlokutori boleh mengandungi kenyataan tentang maklumat atau kepercayaan berserta dengan sumber-sumber dan alasan-alasannya. Di sini, Peter Chen telahpun mendeposkan dalam afidavit plaintif pertama bahawa fakta-fakta dan perkara-perkara yang dideposkan dalam afidavit beliau adalah dalam pengetahuan dan kepercayaan beliau dan/atau daripada rekod-rekod yang beliau, sebagai ex officio, boleh miliki; dan beliau dengan jelas menyatakan bahawa sumber maklumat tersebut adalah rekod-rekod plaintif. Oleh itu, lampiran 35 tidak bercanggah dengan A 41 k 5(2) KMT dan adalah sah boleh diterima dan merupakan dokumen yang kompeten bagi tujuan sekarang ini (lihat ms 26F–H). E F G H

(3) Berdasarkan alasan (i) kepada rayuan defendan keenam, tindakan plaintif terhadap defendan keenam juga berasaskan konspirasi, di mana ia dikatakan bahawa defendan keenam bersama dengan defendan-defendan yang lain telah menyalahi undang-undang I

A melakukan konspirasi dengan tujuan utama menyebabkan kerugian kepada plaintif dan Omega Securities melalui cara-cara yang menyalahi undang-undang (lihat ms 27H–I). Oleh itu, mahkamah tidak mendapati ini adalah satu kes yang sesuai dan betul untuk membatalkan apa-apa penegasan dan penyataan tuntutan yang telah dipinda atau penolakan tuntutan terhadap
B defendan-defendan pertama dan keenam dan menolak kedua-dua rayuan dengan kos (lihat ms 28A).]

Notes

C For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 274–421.

For cases on striking out a statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 5631–5641.

D **Cases referred to**

A Company, Re (no 005009 of 1987) ex p Copp and Anor [1989] BCLC 13 (refd)

Barnes v Addy (1874) 9 Ch App 244 (refd)

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director
E *General of Trade Unions & Ors* [1990] 3 MLJ 231 (refd)

Selangor United Rubber Estates Ltd v Cradock & Ors (No 3) [1968] 1 WLR 1555 CA (refd)

F **Legislation referred to**

Companies Act 1965 ss 4(1), 67

Rules of the High Court 1980 O 18 r 19(1)(a)–(d), O 15 r 6(2)(a), O 41 r 5(2)

Securities Industry Act 1983 ss 87A, 122C

G *Tan Hock Chuan* (*YL Chong* with him) (*Tan Hock Chuan & Co*) for the appellants/first and sixth defendants.

A Vishnu Kumar (*Sri Ram & Co*) for the respondent/plaintiff.

Vincent Ng J: The first and sixth defendants made two similar appeals to
H me vide encll 71 and 72 respectively against the learned senior assistant registrar's decision on 9 February 2001 dismissing their application under O 18 r 19(1)(a) to (d) and O 15 r 6(2)(a) of the Rules of the High Court 1980 ('the RHC') for the following orders:

(a) to strike out all the paragraphs in the plaintiff's amended statement of
I claim dated 30 June 1999 which refer or relate to the first and sixth defendants; and

(b) that the first and sixth defendants cease to be defendants in the suit.

Against the first defendant

The plaintiff sued its former director, the first defendant, for breach of fiduciary duty owed by the first defendant to the plaintiff as a director of the plaintiff.

Against the sixth defendant

The plaintiff sued the sixth defendant for, inter alia, conspiracy and breach of trust as a constructive trustee.

In short, against the first and sixth defendants, the plaintiff alleged that by the fraudulent and dishonest actions of the first and sixth defendants, in breach of trust and fiduciary duties to the plaintiff, the first and sixth defendants caused the plaintiff's subsidiary company, Omega Securities Sdn Bhd ('Omega Securities') to give financial assistance to one John Soh Chee Wen ('John Soh') to purchase the plaintiff's shares ('Omega shares'), which in turn caused Omega Securities to run foul of s 67 of the Companies Act 1965 ('the Act').

To strike out the plaintiff's claim, the first defendant raised the following grounds:

(a) the first defendant was never a shareholder of the plaintiff;

(b) the first defendant was never a director of the plaintiff or its subsidiary company, Omega Securities; and

(c) the plaintiff's documents exhibited in its affidavit in reply are inadmissible hearsay.

And, the sixth defendant raised the following grounds:

(a) the sixth defendant merely conducted the share transactions in its capacity as a stockbroker in the ordinary course of business; and

(b) the plaintiff's documents exhibited in its affidavit in reply are inadmissible hearsay.

The first defendant's ground (c) is common with the sixth defendant's ground (b).

On grounds (a) and (b) of the first defendant's appeal

The lynchpin of the first defendant's contention on grounds (a) and (b) is that since the first defendant, Tony Tiah, was never a shareholder of the plaintiff and never a director of the plaintiff and Omega Securities, the plaintiff's claim against him should be struck off. It is undisputed that the first defendant's name does not appear in the company statutory forms of the plaintiff company and Omega Securities as a director or shareholder.

Upon study of the pleadings and affidavits, I am satisfied that the court cannot strike out the claim against the first defendant for being clearly without merits. Notably, the statement of claim contains averments that the first defendant is a shadow director of the plaintiff and Omega Securities

who had represented and held out that he had control of over 90% of the plaintiff's shareholding. Indeed, there is a pending criminal case against the first defendant, Tony Tiah, based upon the same transaction in this suit.

The material part of the plaintiff's averments in this regard are as follows:

> The plaintiff is a public company. The plaintiff's main business is its 100% wholly owned subsidiary, Omega Securities Sdn Bhd ('Omega Securites'). Omega Securities was a licensed stockbroker and its main business is dealing with shares. The first defendant ('Tony Tiah') is an individual and a stockbroker. At all material times, Tony Tiah represented and held out that he had control over 90% of the plaintiff's shares ('Omega shares'). He was also a director of the plaintiff and Omega Securities within the meaning of the term 'director' as defined in s 4 of the Companies Act 1965 ('the Act'), that is, a shadow director. The other directors of these two companies, that is, the second till the fifth defendants were accustomed to act in accordance with the directions and instructions of Tony Tiah.

The ambit of s 4 includes shadow directors, and this has been succinctly explained by the learned author Walter Woon in his *Company Law Book* (2nd Ed) at p 222:

> Finally there is the 'shadow director'. This rather sinister individual is an actuality a puppeteer. He pulls the strings and his puppets on the board dance. A shadow director is considered to be a director too because s 4(1) of the Companies Act defines the terms 'director' to include 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act ...

and at p 223:

> Millet J explained in *Re Hydrodam Corby Ltd* ... A shadow director by contrast does not claim to purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims are the only directors of the company to the exclusion of himself ...

As such, in my view, it is inappropriate to summarily strike out the plaintiff's claim because the very question of whether the first defendant is a shadow director is a question to be tried. The following passage in *Corporate Powers, Controls Remedies and Decision-Making* by Loh Siew Chang (1999) at p 208 is of assistance in determining this question:

> ... the case of *Re A Company (No 005009 of 1987); ex p Copp & Anor* [1989] BCLC 13. In that case, the company was in financial difficulties and was indebted to a bank. The bank carried out an investigation into the financial affairs of the company and a report was prepared. The report showed that the company was indeed facing financial difficulties. The report also recommended various steps to be taken and the directors of the company implemented the recommendations and in the interim period, securities were taken by the bank. Knox J refused to strike out the action against the bank holding that there were questions to be tried as to whether the bank was indeed a shadow director.

It was in *Re A Company (No 005009 of 1987); ex p Copp & Anor* [1989] BCLC 13 that Justice Knox held (at pp 20–21) that a striking out

application is not applicable to determine whether a person is a shadow director. That process could only be determined through discovery process or cross examination of the witness. A

It was also alleged that the first defendant breached his fiduciary duties to the plaintiff and Omega Securities by fraudulently implementing an elaborate scheme which caused Omega Securities to give financial assistance to John Soh to purchase the plaintiff's shares ('Omega shares') and ran foul of s 67 of the Act. And, that the ultimate objective achieved by the first and sixth defendants (together with the other defendants in this suit), was that John Soh acquired 90% of the plaintiff's shareholding (Omega shares) through the implementation of an elaborate scheme, whereby John Soh was in a position to unlawfully acquire Omega shares ('the scheme'). The particulars of the scheme was condescended upon in great detail. B C

In paras 4.2.1 to 4.4.6(xiii) of the amended statement of claim, the plaintiff alleged that the first and sixth defendants caused Omega Securities to lose its business of trading in securities and thereby unable to generate income because of the revocation of Omega Securities stockbroking licence by the Securities Commission. And, that this had crippled the plaintiff because it lost its core business and investment, that is, its subsidiary company (Omega Securities), as Omega Securities was no longer able to generate any revenue for the plaintiff. D

Further, as there are serious allegations of conspiracy against the first defendant, the summary process of terminating the plaintiff's claim upon affidavit evidence is inappropriate without the advantage of oral evidence, cross examination, discovery and interrogatories. Clearly, the plaintiff's claim is not obviously unsustainable (see *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors* [1990] 3 MLJ 231). E F

On ground (c), the complaint is that since the deponent of the plaintiff's first affidavit (encl 35), Peter Chen, was never a director when the cause of action occurred or arose (that is November 1997) he had no personal knowledge of its contents; nor was he the maker of those documents exhibited in his affidavit. It is expressly provided under O 41 r 5(2) of the RHC that an affidavit sworn for the purpose of an interlocutory application may contain statements of information or belief with the sources and grounds thereof. Here, Peter Chen has already deposed in the plaintiff's first affidavit that the facts and matters which are deposed in his affidavit are within his knowledge and belief and/or from the records which he, ex officio, had access to; and he had clearly indicated that the source of the information was the records of the plaintiff. Thus, I would hold that encl 35 does not run foul of O 41 r 5(2) of the RHC and it is a legally admissible and competent document for the current purposes. G H

The crux of the sixth defendant's submission on its ground (a) is that since the sixth defendant merely sold Omega shares on behalf of its clients in the ordinary course of business, the plaintiff's claim against the sixth defendant should be struck off. To counter this, the plaintiff referred to the I

documents, surrounding circumstances and the pending criminal case against the manager of the sixth defendant, Kimmie Khoo, which is based upon the same transaction in this suit. I note that detailed particulars of conspiracy were also pleaded and set out as follows:

(a) At all material times, first defendant, Tony Tiah, had control over TA Enterprise Bhd ('TA Enterprise') a public company incorporated in Malaysia. TA Enterprise shares are listed, quoted and traded on the Kuala Lumpur Stock Exchange ('KLSE'). The sixth defendant is a licensed stockbroker and is controlled by the first defendant, Tony Tiah through TA Enterprise.

(b) The first defendant caused and procured the Omega shares to be placed with the sixth defendant, which the sixth defendant was well aware of and had knowledge of the objective of the scheme.

(c) By having the plaintiff's shares (Omega shares) and knowledge of the scheme, the sixth defendant knowingly assisted, fraudulently and with dishonest design, and in breach of trust to the plaintiff, as a constructive trustee, sold the plaintiff's shares (Omega shares), which caused Omega Securities to give financial assistance to John Soh to purchase the Omega shares, in violation of s 67 of the Companies Act.

On the law on a stranger's liability as a constructive trustee, the following dicta in *Selangor United Rubber Estates Ltd v Cradock & Ors (No 3)* [1968] 1 WLR 1555 (CA) at p 1580, is illuminating:

> But on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal power ... unless those agents receive and become chargeable with some part of the trust property or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. ...
>
> It is this formulation in *Barnes v Addy* (1874) 9 Ch App 244 'assist with knowledge in a dishonest and fraudulent design on the part of the trustee' that is the basis of the plaintiff's claim that defendants are liable as constructive trustees. There are thus, three elements: (1) assistance by the stranger, (2) with knowledge, (3) in a dishonest and fraudulent design on the part of the trustees.

In support of the plaintiff's pleaded case, the following are noted:

(a) It is undisputed that Kimmie Khoo is the general manager of the sixth defendant and therefore an employee of the sixth defendant, and that the first defendant controls the sixth defendant.

(b) Kimmie Khoo who is the personal assistant of the first defendant was also charged under s 87A read together with s 122C of the Securities Industry Act 1983, as having abetted John Soh to defraud Omega Securities.

The plaintiff's action against the sixth defendant is also premised upon conspiracy, whereby it was alleged that the sixth defendant together with the other defendants unlawfully conspired with the predominant purpose of causing loss to the plaintiff and Omega Securities by unlawful means. And, I note that detailed particulars of this were also set out in paras 4.2 to 4.4.6 of encl 2.

For all the above reasons, I did not find this to be a fit and proper case for striking out of any of the averments in the amended statement of claim or dismissal of the claim against the first and sixth defendants, and I dismissed both the appeals vide encll 71 and 72 with costs.

Appeals dismissed.

Reported by Chew Phye Aun